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In the Supreme Court of the United States

OCTOBER TERM, 1958.

No. [redacted] 85

THE RICHMAN BROTHERS COMPANY,
Petitioner,

v.

AMALGAMATED CLOTHING WORKERS OF AMERICA, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

Petitioner, The Richman Brothers Company, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio, entered in the above entitled case on March 4, 1959.

OPINIONS BELOW.

The opinion of the Eighth District Court of Appeals of Ohio, reported in *Richman Bros. Co. v. Union*, 104 Ohio App. 112, 144 N. E. 2d 573 (1957), is printed in Appendix B. The opinion of the Supreme Court of Ohio, reported in *Richman v. Amalgamated Clothing Workers*, 168 O. S. 560 (1959), and the dissenting opinion concurred in by three of the seven judges of that court, reported in 168 O. S. at 565, are printed in Appendix B.

JURISDICTION.

The judgment of the Ohio Supreme Court was entered March 4, 1959. (R. 2).[1] The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3c), which permits review by certiorari of a case involving the construction of a federal statute. *Garner v. Teamsters Union*, 346 U. S. 485 (1953); *Murray v. Joe Gerrick & Co., et al.*, 291 U. S. 315 (1933).

In this case The Richman Brothers Company sought to enjoin all picketing of *its retail stores* by defendants, Amalgamated Clothing Workers of America, its Cleveland Joint Council, four of its Cleveland locals, and certain individuals, who sought by such picketing to coerce Richman to compel or influence its *factory* employees, none of whom worked within two miles of any of such stores (R. 61; Stip. par. 5), to join the union.[2]

In the court of first instance, the Common Pleas Court of Cuyahoga County, Ohio, the defendants moved to dismiss the case on the ground that jurisdiction of the subject matter had been removed by the National Labor Management Relations Act. This motion was overruled, and the court found for Richman and enjoined all picketing.

Defendants appealed on questions of law and fact to the Eighth District Court of Appeals of Ohio, which, under Ohio practice, resulted in a trial de novo in the Court of Appeals on the transcript of the evidence in the lower court.

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[1] Record references are to the record certified by the Supreme Court of Ohio.

[2] Richman manufactures men's clothing at factories in Cleveland, Ohio, and Sturgis, Kentucky, and sells them at a number of retail stores which it owns and operates in various states (R. 60). It filed the case on October 18, 1952. A collateral case in the federal courts, involving power of a federal court to enjoin this state court case, in view of 28 U. S. C. § 2283, but which obviously did not involve the facts or question here presented, was decided in *Amalgamated Clothing Workers v. Richman Bros. Co.*, 348 U. S. 643 (1955).

The Court of Appeals granted an injunction against mass picketing of Richman's retail stores, but refused to enjoin peaceful picketing for the reason stated in its journal entry and decree, in which it stated (R. 77):

> "that the court does not have jurisdiction of the subject matter herein to the extent that it involves peaceful picketing; that the purpose of the picketing was to bring economic pressure to bear upon the business of plaintiff in order to force it to enter into a contract with defendant, Amalgamated Clothing Workers of America, for the right to use its union label on clothes manufactured by it; *that the defendant knew that such contract could not be consummated without the manufacturing employees of plaintiff becoming unionized,*[3] that the essential purpose of the picketing was to intimidate and coerce plaintiff into compelling its manufacturing employees to join defendant, Amalgamated Clothing Workers of America; that these activities on the part of defendants constitute unfair labor practice as defined in Section 8 (a) (1) and (3) and 8 (b) (2) of the National Labor Relations Act, Title 29, United States Code, Section 151; that the National Labor Relations Board has exclusive jurisdiction with respect to such unfair labor practice; and that the plaintiff is entitled to relief against mass picketing, including picketing alleged in paragraph 15 of the petition herein."

The emphasized finding, upon which the court's conclusion that the picketing constituted an unfair labor practice under section 8 (b) (2) depended,[4] was contrary to the uncontroverted evidence in the record, consisting of the statement of Jacob Potofsky, Amalgamated's President, that "the Amalgamated label is available to all em-

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[3] Emphasis throughout is supplied unless otherwise indicated.

[4] The court's conclusion that defendant's conduct was also an unfair labor practice under "§ 8 (a) (1) and (3)" is incomprehensible, because section 8 (a) defines only unfair labor practices by *employers*, not labor organizations, 29 U. S. C. § 158 (a).

ployers under contract with the Amalgamated irrespective of whether the contract provides for union security" (R. 58, 59), testimony of his assistant (R. 58, 59) and Amalgamated's Constitution (R. 65).

Richman's motion for a new trial (R. 73), based on the identical grounds assigned as errors in the Ohio Supreme Court, was overruled (R. 83).

Richman appealed to the Ohio Supreme Court, assigning error to the judgment of the Court of Appeals as follows (R. 12):

> "Now comes The Richman Brothers Company, Plaintiff-Appellant herein, and files this, its Assignment of Errors herein, upon which it relies on this appeal from the judgment of the Court of Appeals.
>
> "1. The court erred in holding that it did not have jurisdiction of the subject matter of this action to the extent that it involved peaceful picketing, and that exclusive jurisdiction thereof was in the National Labor Relations Board.
>
> "2. The court erred in holding that said peaceful picketing constituted an unfair labor practice as defined in § 8 (a) (1) and (3) and 8 (b) (2) of the National Labor Relations Act, Title 29, U. S. Code, § 158.
>
> "3. The finding, holding and judgment of the court that it had no jurisdiction of the subject matter of this action to the extent that it involved peaceful picketing is contrary to law and is not sustained by sufficient evidence in that it is not supported by any evidence and is contrary to the only evidence upon the subject in the record including the evidence offered by the defendants.
>
> "4. The finding and holding of the court that the said peaceful picketing constituted an unfair labor practice as defined in § 8 (a) (1) and (3) and 8 (b) (2) of the National Labor Relations Act, Title 29,

U. S. Code, § 158, is contrary to law and is not sustained by sufficient evidence in that it is not supported by any evidence and is contrary to the only evidence upon the subject in the record including the evidence offered by the defendants.

"5. The finding and holding of the court that a contract between the plaintiff and the defendant, Amalgamated Clothing Workers of America, for the right to use its label on clothes manufactured by plaintiff could not be consummated without the manufacturing employees of plaintiff becoming unionized, is contrary to law and is not sustained by sufficient evidence in that it is not supported by any evidence and is contrary to the only evidence upon the subject in the record including the evidence offered by the defendants.

"6. The court erred in restricting the relief granted to the plaintiff by its judgment herein to mass picketing and not granting relief against the peaceful picketing of the plaintiff's retail stores by the defendants."

The Supreme Court of Ohio affirmed the judgment of the Court of Appeals that its jurisdiction had been preempted by the National Labor Management Relations Act (R. 4), on the general principle announced in its syllabus of points, which states the decision of the court, as follows (R. 85):

Rule VI of the Ohio Supreme Court provides:

"In each cause a syllabus of the points decided by the Court, shall be stated in writing by the Judge assigned to prepare the opinion of the Court. Such syllabus shall be confined to the points of law arising from the facts of the cause as determined by the Court.

"The syllabus shall be submitted to the Judges concurring therein, for revisal, before publication thereof; and it shall be inserted in the volume of official reports without alteration, unless otherwise ordered by the Judges concurring therein."

> "Where interstate commerce is involved and a labor union, through its members who are not former or present employees of an employer, engages in nonviolent picketing of such employer's premises to induce the unionization of his employees, the National Labor Relations Act (Section 141 *et seq.*, Title 29, U. S. Code, as amended) has exclusive application, and, by decisions of the Supreme Court of the United States interpreting such act, state courts lack the power and jurisdiction to intervene."

The court found it unnecessary to determine whether or not the finding and conclusion of the Court of Appeals that the picketing constituted an unfair labor practice was erroneous. It did not deal with this matter in either its syllabus or opinion. The opinion explains the broad sweep of the decision evidenced by the syllabus in these concluding sentences (168 O. S. at 565; R. 90):

> "In view of the sweeping decisions of the Supreme Court of the United States applying the National Labor Relations Act in a variety of circumstances, including those similar to the one existing here, we can discover no other alternative than to affirm the judgment of the Court of Appeals herein. If we are wrong in our conclusion, the Supreme Court of the United States, as our superior in a matter of this kind, may be afforded the opportunity of telling us so."

QUESTION PRESENTED.

Whether the National Labor Management Relations Act, 1947, 29 U. S. C. § 141, et seq., ousts the jurisdiction of a state court to enjoin nonviolent picketing for the purpose of coercing an employer to compel, or influence, its employees to become members of the picketing union, where it is clear that the picketing is neither an activity protected by section 7 of that Act, nor an unfair labor practice as defined in section 8, of which the National Labor

Relations Board could take jurisdiction; and that at the time the picketing commenced, and thereafter, it would have been futile to file charges with the Board, because of its settled position that picketing for the only possible purpose appearing from the uncontroverted evidence does not constitute an unfair labor practice which the Board would have jurisdiction to remedy.

STATUTES INVOLVED.

The statutory provisions involved are certain provisions of the National Labor Management Relations Act, 29 U. S. C. § 141, et seq., and particularly § 158, pertinent parts of which are printed in Appendix A.

STATEMENT.

Much of the case has been stated necessarily in specifying the way in which the federal question sought to be reviewed was raised and in which it was passed upon by the courts below, pursuant to Rule 23(1)(f) of this Court. The following salient facts are important in considering the reasons presented for granting of the writ.

First, bearing on whether the picketing was protected as an exercise of the "right to self-organization" conferred by section 7 of the Act, are the following facts. Although Amalgamated sought to cause only manufacturing employees of Richman to join the union (R. 55, 56), its picketing was conducted exclusively at the entrances to Richman's retail stores, where none of such employees worked (R. 57). None of the stores were located within two miles of Richman's manufacturing plants. Instead, they were located over most of the United States from coast to coast (R. 61, 63). The parties stipulated that the pickets were "persons who were not employees of Richman" (Stip. par. 13, R. 62, 63).

Second, bearing on the question of whether the picketing constituted an unfair labor practice, are the following facts. Amalgamated had tried for ten years to organize the manufacturing employees of Richman without success (R. 79; Concl. Fact No. 3). Amalgamated never made any demand upon Richman's management of any kind (R. 48-50; Stip. par. 12, R. 62). The picketing started immediately after Amalgamated's local representative in Cleveland had written Richman's president suggesting a meeting, and had been advised that the latter was out of town (R. 48-50). Amalgamated's representatives, previous to the picketing, had suggested to certain of Richman's store managers that Richman's management should make an agreement with Amalgamated, and that Richman clothes should bear the union label (R. 38-41), and the pickets' signs stated that Richman clothes did not bear the union label; and, after the picketing began, Amalgamated's union label representative told one Richman store manager to urge Richman's management to "sign up." (R. 47, 48.) But no form of contract was ever submitted and there was never any discussion with representatives of Richman as to proposed terms or conditions.

The natural inference from the picketing and the signs was that the picketing was for the purpose of coercing Richman to cause it to acquire the right to use Amalgamated's union label. Article XIII of Amalgamated's constitution provides that the General Executive Board of Amalgamated "shall approve a form or forms of label for the identification of products manufactured by employers in contractual relations with Amalgamated," and that "licenses for the use of the label may be granted to any employer in contractual relations with the Amalgamated" (R. 65). Since "contractual relations" were a requisite to use of the union label, the Court of Appeals inferred and

found that the purpose of the picketing was to force Richman to "enter into a contract" with Amalgamated "for the right to use its union label on clothes manufactured by" Richman (Journal entry, quoted, *supra*). As previously seen, the Amalgamated label is available "to all employers under contract with the Amalgamated irrespective of whether the contract provides for union security," so that, contrary to the Ohio Court of Appeals' finding, the contract *could* have been "consummated without the manufacturing employees of plaintiff becoming unionized" (Journal Entry, *supra*).

Absent any demand by Amalgamated disclosing its purpose, it could not be inferred that any particular terms or conditions in the contract for the union label were desired, but it was clear that the contract was sought as part of a campaign to influence Richman's employees to join the union. Amalgamated's answer admitted in paragraph 5, that the picketing was part of "a campaign to organize employees of Richman" (R. 29). In the absence of other evidence, the only possible inference is that Amalgamated wanted a contract—any kind of contract—with Richman, so it could pose as having achieved "recognition" from Richman, and thus influence the latter's employees to get on the bandwagon and accept and join the union thus favored.

Third, bearing on the existence of an unfair labor practice, it was stipulated by the parties that (R. 62):

> "12. Neither Amalgamated nor any other labor organization or person is the representative, for purposes of collective bargaining with Richman, of those of its employees at its factories and/or its stores, who are eligible for any such representation by said union; and no notice has been given to Richman that Amalgated or any other labor organization or person,

claims to be such representative or to be entitled to be recognized or dealt with as such by Richman."

Richman did not file charges with the National Labor Relations Board at any time, either before or after commencement of the action.

REASONS FOR GRANTING THE WRIT.

1. The Supreme Court of Ohio has decided a federal question of substance not heretofore determined by this Court, in that it has construed the National Labor Management Relations Act, 29 U. S. C. § 141 et seq., as depriving a state court of jurisdiction to enjoin *any* nonviolent organizational picketing, where interstate commerce is involved, *because of that fact alone*, and irrespective of other facts disclosing that the picketing is illegal under state law, is not "protected" by the National Labor Management Relations Act, and is not remediable by the National Labor Relations Board.

More specifically, the Ohio Supreme Court so held even though it was clear from the uncontroverted evidence in the record:

(1) that the picketing was not an activity protected by section 7 of the National Labor Management Relations Act, 29 U. S. C. § 157;

(2) that it was not an unfair labor practice under section 8 of the Act, 29 U. S. C. § 158, which the National Labor Relations Board would have jurisdiction to remedy; and

(3) that it would have been futile to apply to the Board for relief, *Building Trades Council v. Kinard Construction Co.*, 346 U. S. 933 (1954), not because the Board would have refused to exercise jurisdiction which it had due to a Board policy as in such cases as *Amalgamated*

Meat Cutters v. Fairlawn Meats, 353 U. S. 20 (1957) and *Office Employees v. Labor Board*, 353 U. S. 313 (1957), but, instead, because of the Board's settled decisions that, on such facts, it *lacked* jurisdiction in that no unfair labor practice was involved.

2. The Supreme Court of Ohio has decided this federal question in a way probably not in accord with applicable decisions of this Court, in that, according to the criteria apparently applied by this Court, jurisdiction to enjoin nonviolent picketing on the uncontroverted facts here presented has not been withdrawn from the state courts by the National Labor Management Relations Act.

While it so happens that the pattern of facts in the case at bar has not been presented in cases previously before the Court, obviously it is not an unusual pattern. And this will be increasingly true as unions which resort to pressuring employers to influence their employees who are not persuaded of the benefits of unionization become increasingly more sophisticated in their methods. Thus, the unsuccessful demands for closed shop contracts, and lack of success in representation elections, followed by minority picketing, which have caused the National Labor Relations Board to police such unfair labor practices, are not presented here, and, no doubt, will not appear in an increasing number of cases of peaceful picketing in the future.

The case at bar presents, therefore, an opportunity for the Court to define further the "penumbral area" which "can be rendered progressively clear only by the course of litigation," *Weber v. Anheuser-Busch, Inc.*, 348 U. S. 468 (1954), 480; and to reject the doctrine, advanced by Amalgamated to, and accepted by, the Ohio Supreme Court, that state courts are *completely* excluded from the

area of peaceful picketing, thus easing the concern expressed in the concurring opinion in *San Diego Building Trades Council, Etc. v. Garmon*, — U. S. —, 79 S. Ct. 773 (1959) as to "the Court's intimation that the States may even be powerless to act when the underlying activities are clearly 'neither protected nor prohibited' by the federal Act" (784).

This is one case of unprotected injurious conduct which "either is governable by the State or it is entirely ungoverned,'" and in which, therefore, the Court would decline "to find an implied exclusion of state powers," *Garner v. Teamsters Union*, 346 U. S. 485 (1953), 488. The desirability of reaffirmance of this doctrine, expressed in *Garner*, is emphasized by a statement in an article on this subject, Isaacson, *Labor Relations Law: Federal v. State Jurisdiction*, 42 Am. Bar. Jour. 415 (1956), in which the author, noting what he apparently considered to be an inconsistency between the above statement and another statement in the opinion, said (420):

> "Whether this truly represents a state of judicial ambivalence or whether it represents a ritualistic bow and judicial tip of the hat to a discarded doctrine cannot be ascertained from the *Garner* opinion. Nor have the preemption cases which have followed Garner furnished any leads on which to base an informed answer to this question. * * *
>
> "In its latest decision, in Anheuser-Busch, the Court has failed to measure up to its obligation to bring about a greater degree of clarity and understanding in this field."

The truth of the above statements as to the nature of this case appears from the following.

First, the peaceful picketing in this case could not have constituted an activity protected by section 7 of the Act. The pickets were not fellow employees of the factory

workers at Richman's plants. They could not even have been assisting Richman's factory employees in the exercise of "the right to *self*-organization," etc. which is protected by section 7, because they were picketing at the retail stores, where they could not possibly contact the Richman factory employees to assist them in the exercise of that right either by persuasion, instruction, or other means. The pickets were mere "non-employee organizers" to whom "no such obligation," to refrain from interference with the right, "is owing," *NLRB v. Babcock & Wilcox Co.*, 351 U. S. 105 (1956), 113.

Second, the picketing clearly did not constitute an unfair labor practice which the National Labor Relations Board would have power and jurisdiction to prevent.

The only portions of section 8 (b) of the National Labor Management Relations Act, 29 U. S. C. § 158, which could possibly have application are sections 8(b) (1) (A) and 8(b) (2).

Section 8(b) (1) (A) makes it an unfair labor practice for a labor organization to restrain or coerce "employees in the exercise of the rights guaranteed in § 157 of" Title 29 U. S. C. At the time this case was filed in 1952 the Board had taken the unequivocal position for several years that picketing for the purpose of coercing an employer to influence his employees to join the union did not constitute an unfair labor practice under this subsection, because the subsection made only *direct* coercion of employees an unfair labor practice, and not *indirect* coercion through pressure on their employer, such as is here involved, *Matter of National Maritime Union*, 78 NLRB 971 (1948), 982; *United Construction Workers*, 94 NLRB 1731 (1951), 1733. Applying the Board's view of the law, a regional director, and the general counsel of the Board, whose ruling on the refusal of the regional director to issue

a complaint was final (29 U. S. C. § 153), completely blocked consideration by the Board of an employer's charge of an unfair labor practice arising from picketing like that here involved in *NLRB v. Swift & Co.*, 130 F. Supp. 214 (D. C. Mo. 1955), 218, aff'd as modified, 233 Fed. 2d 226 (8th Cir. 1956). This occurred more than three years after this case was filed in the Ohio courts.

In 1957 the Board reversed itself to the extent of holding that picketing for the purpose of coercing employees in the exercise of their right under section 7 "to bargain collectively through representatives of their own choosing" constitutes an unfair labor practice, even though the coercion is exercised *indirectly* through pressure on their employer. But the Board so holds only in cases where the facts disclose that the union is picketing for *immediate* representation of the employees as their *exclusive* collective bargaining representative in the appropriate unit pursuant to 29 U. S. C. § 159(c)(1). *Curtis Bros., Inc.*, 119 NLRB 232 (1957); *Alloy Mfg. Co.*, 119 NLRB 307 (1957); *Shepherd Machinery Co.*, 119 NLRB 320 (1957); *Lane Bryant San Francisco, Inc.*, 42 LRRM 1415 (1958). The Board, however, has not reversed its prior stand to the extent of holding that picketing for a contract—terms unspecified—not involving *immediate* recognition of the union as the *exclusive* bargaining representative of the employees in the appropriate unit is an unfair labor practice.

In this case, if Amalgamated had secured the union label contract for which it picketed, this could have been no more than one feeble step on the road to status as an exclusive bargaining representative of Richman's employees under the Act. It would still have been necessary for Amalgamated, in order to file and process a petition for an election under Board rules, 1 CCH, LLR (4th

ed.), par. 2,540, p. 2,328, to show that at least 30 percent of the employees involved had indicated that they wished to be represented by Amalgamated. The union label contract for which Amalgamated was picketing could have accomplished no more than *perhaps* to assist Amalgamated in signing up enough employees to enable it to seek an election; and thus, at some indefinite future time, *perhaps* to be elected by vote of a majority of Richman's factory employees as their exclusive bargaining representative.

In any event, the Board's decision in *Curtis Bros., Inc.*, was reversed in *Drivers, Chauffeurs & Helpers Local No. 639 v. NLRB*, — Fed. 2d —, 36 Lab. Cas. 65,183 (D. C. Cir. 1958), in which the court held that picketing of the nature here involved does not constitute an unfair labor practice under § 8(b)(1)(A).

Section 8(b)(2) of the Act, 29 U. S. C. § 158(b)(2), makes it an unfair labor practice for a labor organization to attempt to cause an employer to "discriminate against an employee in violation of subsection (a)(3) of" section 8, and subsection 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."[6] The uncontroverted facts here do not disclose that Amalgamated attempted to coerce Richman to influence its employees by any particular means—certainly, not by discrimination in regard to hire or tenure

[6] *Garner*, the leading case, was decided on the assumption that picketing by a union to force an employer to violate a provision of the Pennsylvania state labor relations act *identical* with 29 U. S. C. § 158(a)(3) (see 346 U. S. at 487, note 3) could not be enjoined by a Pennsylvania court, because the Pennsylvania statute could not be so applied to impinge on the area preempted for the National Labor Relations Board by 29 U. S. C. § 158(b)(2) and (a)(3) (see 346 U. S. at 487 and 488, note 5).

of employment or any condition of employment. This occurs automatically where the union pickets for a closed shop contract, which necessarily causes such discrimination. But, as seen, the contract, for which Amalgamated picketed would not necessarily have included such a provision. Discrimination is necessary to constitute an unfair labor practice under § 8(b)(2), *Radio Officers Union v. NLRB*, 347 U. S. 17 (1954), 42, and the statute in terms requires discrimination in these particular respects.

As early as 1949, more than three years before this case was commenced, the Board held in *Lumber and Saw Mill Workers Union*, 87 NLRB 937 (1949), that peaceful picketing for recognition unaccompanied by a demand indicating that the "clear objective of the strike was to compel the Company to agree to a demand for an unlawful union shop arrangement" (p. 939) was not an unfair labor practice under § 8(b)(2). It adhered to this view in *United Mine Workers of America*, 103 NLRB 1572 (1953). The Board's general counsel, in 1953, issued an administrative decision that "picketing is not attempt to cause employer discrimination where union makes no demand for contract of any kind and statements of union official are insufficient to establish that purpose of union picketing is to obtain unlawful union security contract," Case No. 840, 2 CCH, LRR (4th ed.) 4537. The Board's general counsel and regional director, in 1955, took the same position in *Swift*, 130 F. Supp. 214, *supra*. The Board has not changed its unassailable position on this point since.

Section 8(b)(4), 29 U. S. C. § 158(b)(4) which this Court thought was involved in *Hotel Employees Union, Local Union 255 v. Sax Enterprises, Inc.*, 358 U. S. 270 (1959), obviously has no application here because the picketing there was for the purpose, in part at least, of inducing employees of certain Miami Beach hotels to strike

to force other hotel employers to recognize the union as the representative of their employees when the union had not been certified under section 9, contrary to § 8(b)(4)(B). This resulted from the juxtaposition of the hotels involved in one small area which was picketed indiscriminately by the union. The Board has always taken the position that § 8(b)(4) is only intended to outlaw picketing aimed at secondary boycotts, and not primary strike action at the employer's premises. *Oil Workers' International Union, Local No. 346*, 84 NLRB 315 (1949), 317. Here, of course, primary picketing at Richman's retail stores was involved—not secondary picketing at the premises of others.

Third, as to the necessity of making application to the Board, this Court indicated in both *Garner* (346 U. S. at 488) and *Kinard Construction Co.* (346 U. S. at 933) that, if it was clear that it would be futile to apply to the Board for relief, a state court would have jurisdiction to grant relief to enjoin nonviolent picketing. It is clear from the foregoing that it would have been useless to apply to the Board at the time this case was filed in 1952, and at all times thereafter. If this were not true today, simple justice would require that a reversal of the Board's position as to § 8(b)(1)(A) in 1957, five years after expiration of the six months' limitation with which a complaint must be filed with the Board, as required by section 10 of the Act, 29 U. S. C. § 160(b), should not affect this pending case.

Finally, the previous cases before this Court have involved either potential protected activities, in the nature of organizational picketing at places where it could assist in self-organization of employees, or potential unfair labor practices. This is true even in cases where the per curiam

decisions of the Court did not clearly disclose the facts upon which the Court's decisions were based, such as *Retail Clerks v. Newberry Co.*, 352 U. S. 987 (1957), where the employer amended its petition in the state court to leave out specific allegations of federal unfair labor practices, but it appeared from the papers before this Court that a demand for a union shop contract was involved (Juris. Stmt. p. 5); and *District Lodge 34 v. Cavett Co.*, 355 U. S. 39 (1957), s. c. 103 Ohio App. 45, and *Youngdahl v. Rainfair, Inc.*, 355 U. S. 131 (1957), in each of which a minority union picketed for recognition as exclusive bargaining representative agent after losing an election, and thus might have committed an unfair labor practice under § 8(b)(1)(A).

CONCLUSION.

For the foregoing reasons, this writ for certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Statutes Involved.

Title 29 U. S. Code § 157

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title. July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, 3.17 p.m., E. D. T., c. 120, Title I, § 101, 61 Stat. 140.

Title 29 U. S. Code § 158

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the be-

ginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 159(f), (g), (h) of this title, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or

(B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or of retaining membership;

* * *

APPENDIX B.

Opinions of Ohio Supreme Court and Ohio Court of Appeals.

THE RICHMAN BROTHERS CO., APPELLANT, v. AMALGAMATED CLOTHING WORKERS OF AMERICA, ET AL., APPELLEES.

Labor unions—Picketing to induce unionization of employees—Members of picketing union not employees of employer picketed—Employer engaged in interstate commerce—State courts without jurisdiction to intervene.

Where interstate commerce is involved and a labor union, through its members who are not former or present employees of an employer, engages in nonviolent picketing of such employer's premises to induce the unionization of his employees, the National Labor Relations Act (Section 141 *et seq.*, Title 29, U. S. Code, as amended) has exclusive application, and, by

decisions of the Supreme Court of the United States interpreting such act, state courts lack the power and jurisdiction to intervene.

(No. 35541—Decided March 4, 1959.)

APPEAL from the Court of Appeals for Cuyahoga County.

The Richman Brothers Company, hereinafter referred to as Richman, is a large and long established Ohio corporation principally engaged in the manufacture and sale of men's clothing. Its main factory is in Cleveland and it owns and operates a smaller factory in Sturgis, Kentucky. The clothing it fabricates, with other articles of wearing apparel, is sold at some 70 retail stores located in Ohio and other states. It is apparent and is conceded that Richman is engaged in interstate commerce.

Those employed by Richman in manufacturing its clothes have not been and are not now members of a labor union or unions. For a number of years the Amalgamated Clothing Workers of America, AFL-CIO, the Cleveland Joint Board, an affiliate, and other unions connected with the Amalgamated Clothing Workers of America, through their officers and members, unsuccessfully sought to unionize Richman's factory employees. Beginning with the latter part of March 1951, the unions began picketing the Richman retail stores. Some of the pickets carried signs proclaiming that Richman clothes are not union made and urging the purchase of clothing which bears the union label. For the most part, the picketing was of a peaceful character, however, on a number of occasions, about 20, it assumed mass and boisterous proportions, causing sidewalk congestion and the blocking of the entrances to the Richman stores.

In October 1952, Richman began the present action in the Court of Common Pleas of Cuyahoga County against

the Amalgamated Clothing Workers of America, its Cleveland joint council, four Cleveland local unions and individual defendants to enjoin all picketing of the Richman stores. Allegedly, the purpose of the picketing was to coerce Richman by harassment and economic pressure to influence its factory employees to become unionized. The petition states that "defendants are now engaged, in carrying forward a conspiracy to cause economic pressure to be directed against plaintiff with the intention and for the purpose and objective of thereby causing plaintiff to force sufficient of its eligible employees to become members of defendant Amalgamated, so that defendant Amalgamated may become the representative of its such employees for the purposes of collective bargaining with plaintiff, regardless of the desires of a majority thereof."

Litigation progressed inconclusively in both the federal and state courts and finally the cause came on for hearing on its merits in the Cuyahoga County Common Pleas Court. That court found that the picketing complained of represented an unlawful plan or conspiracy against Richman contrary to the public policy of Ohio and issued an injunction prohibiting *all* picketing of the Richman stores.

An appeal on questions of law and fact was perfected to the Court of Appeals by the defendants, which court heard the cause *de novo* but on the transcript of the evidence taken in the lower court. The Court of Appeals found that it had jurisdiction of the parties and subject matter; that the allegations of the petition are true in that "the essential purpose of the picketing was to intimidate and coerce plaintiff [Richman] into compelling its manufacturing employees to join defendant, Amalgamated Clothing Workers of America; that these activities on the part of defendants constitute unfair labor practice" as de-

fined in the National Labor Relations Act; and "that the National Labor Relations Board has exclusive jurisdiction with respect to such unfair labor practice."

However, the Court of Appeals decided it did have jurisdiction and power in certain respects under the decision in *United Automobile, Aircraft & Agricultural Implement Workers of America v. Wisconsin Employment Relations Board*, 351 U. S., 266, 100 L. Ed., 1162, 76 S. Ct. 794, and enjoined and restrained the defendants:

> "(1) From interfering in any manner whatsoever with plaintiff's officers, agents, employees, representatives and others having business with plaintiff; from interfering with ingress to or egress from plaintiff's stores and premises, and with pedestrian or vehicular traffic in or about said stores, including the delivery, unloading and dispatch of equipment, supplies, merchandise, materials and products to and from plaintiff's said stores;
>
> "(2) From engaging in mass picketing and demonstrations in front of plaintiff's stores, including particularly demonstrations in which pickets march in circular, quadrangular, or other, formations in front of the entrances of plaintiff's stores;
>
> "(3) From in any way interfering with the access to the plaintiff's stores and premises, and from accosting persons seeking to enter or leave plaintiff's stores;
>
> "(4) From causing, encouraging or assisting anyone in the commission of said acts."

Later Richman requested the court to state its findings of fact separately from its conclusions of law, upon which its judgment was based, which request was complied with.

Richman being dissatisfied with the judgment of the Court of Appeals filed its motion in this court to require

the Court of Appeals to certify the record. Such motion was allowed, and the cause is now here for disposition on the merits.

Messrs. Jones, Day, Cockley & Reavis, Mr. Victor DeMarco, Mr. George D. Bonebrake and Mr. George H. Rudolph, for appellant.

Messrs. Smoot & Riemer, Mr. William J. Isaacson and Mr. Marshall J. Seidman, for appellees.

ZIMMERMAN, J. There are thinking citizens in the United States who view with concern and misgiving the steadily growing centralization of powers in the federal government and its agencies, and the alacrity with which those powers have been assumed and exercised. Noticeably, the several states are becoming less and less important in the over-all governmental scheme as they have either voluntarily or by compulsion relinquished prerogatives and transferred duties which were formerly theirs.

Existing conditions are reflected to an extent in the relationships between labor and management which are now controlled to an appreciable degree by the National Labor Relations Act. (Section 141 *et seq.*, Title 29, U. S. Code, as amended) and the interpretation of that act by the federal courts. In many conflicts between labor and management where interstate commerce is involved, as is the case here, the National Labor Relations Act asserts itself and is applied to the exclusion of interference by the state courts. This is so with respect to the "peaceful picketing" of an employer's premises by labor unions and their members to force the employer to accede to the unions' demands and to bring about the unionization of those who work for the employer.

The leading case relating to a situation of that kind is *Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776*, 346 U. S., 485, 98 L. Ed., 228, 74 S. Ct., 161, which is outlined and discussed at some length in *Grimes & Hauer, Inc., v. Pollock*, 163 Ohio St., 372, 127 N. E. (2d), 203 (certiorari denied, 350 U. S., 900, 100 L. Ed., 791, 76 S. Ct., 178).

On the basis of our interpretation of the holding in the *Garner* case, we said in the opinion in the *Grimes & Hauer* case:

> "* * * The *Garner* case * * * lays down the rule that a state court does not possess the power to enjoin union conduct, such as the picketing of an interstate employer's premises to induce the unionization of its employees, since such activity presents the question of an unfair labor practice within the meaning of the terms of the Labor Management Relations Act which, initially at least, is exclusive."

As far as we can ascertain, the Supreme Court of the United States has rendered no later decisions with which the above-quoted language is in conflict.

One of the latest expressions, if not the latest, of the Supreme Court of the United States is found in the *per curiam* opinion in *Hotel Employees Union, Local No. 255, v. Sax Enterprises, Inc.*, __ U. S., __, 3 L. Ed. (2d), 289, 79 S. Ct., 273, decided January 12, 1959. There the Supreme Court of Florida had affirmed the issuance of permanent injunctions against the non-violent picketing of 12 Florida resort hotels for organizational purposes, which had for its objective the forcing of the employees of the hotels to designate the union or certain of its members as their bargaining agents and the coercing of the hotels through economic sanctions to sign contracts with the union, which contracts were to be used as a basis to

compel the hotel employees to become members of the union. See *Sax Enterprises, Inc., v. Hotel Employers Union, Local No. 255* (Fla.), 80 So. (2d), 602, 605.

In reversing the judgments of the Florida Supreme Court, the Supreme Court of the United States said:

> "The Florida courts were without jurisdiction to enjoin this organizational picketing, whether it was activity protected by Section 7 of the National Labor Relations Act, as amended, 29 U. S. C., Section 157, *Hill v. Florida*, 325 U. S., 538, 89 L. Ed., 1782, 65 S. Ct., 137, or prohibited by Section 8(b) (4) of the act, 29 U. S. C., Section 158 (b) (4), *Garner v. Teamsters, C. & H. Local Union*, 346 U. S., 485, 98 L. Ed., 228, 74 S. Ct., 161. See *Weber v. Anheuser-Busch, Inc.*, 348 U. S., 468, at 481, 99 L. Ed., 546, 558, 75 S. Ct., 480. This follows even though the National Labor Relations Board refused to take jurisdiction, *Amalgamated Meat Cutters, etc., v. Fairlawn Meats, Inc.*, 353 U. S., 20, 1 L. Ed. (2d), 613, 77 S. Ct., 604, 609. The record does not disclose violence sufficient to give the state jurisdiction under *United Auto. A. & A. I. Workers v. Wisconsin Employment Relations Board*, 351 U. S., 266, 100 L. Ed., 1162, 76 S. Ct., 794."

It would serve no useful purpose to carry this discussion further. Counsel for Richman have advanced a number of ingenious arguments in an attempt to place the instant case within the jurisdiction of Ohio courts, but in our opinion they have not succeeded.

Notwithstanding the writer's dissenting opinions, the existing public policy of this state is established by the cases of *Crosby v. Rath*, 136 Ohio St., 352, 25 N. E. (2d), 934, and *Chucales v. Royalty*, 164 Ohio St., 214, 129 N. E. (2d), 823, and is against "stranger picketing" of the kind practiced in the instant case.

The following question may arise in the minds of many: Where, as here, an employer and his employees are perfectly satisfied with existing working conditions and desire no relations with any labor union, why should they have to submit to harassment and persecution in Ohio by outsiders insisting on unwanted unionization and be precluded from resorting to Ohio courts for relief? As previously indicated, the answer is found in the decisions of the United States Supreme Court, which relegate a complaining employer engaged in interstate commerce to the National Labor Relations Board where response is uncertain, problematical and often long delayed.

In view of the sweeping decisions of the Supreme Court of the United States applying the National Labor Relations Act in a variety of circumstances, including those similar to the one existing here, we can discover no other alternative than to affirm the judgment of the Court of Appeals herein. If we are wrong in our conclusion, the Supreme Court of the United States, as our superior in a matter of this kind, may be afforded the opportunity of telling us so.

Judgment affirmed.

STEWART, TAFT and MATTHIAS, JJ., concur.
WEYGANDT, C. J., BELL and HERBERT, JJ., dissent.

BELL, J., dissenting. It appears to us that the very question stated in the next to the last paragraph of the majority opinion suggests its own answer. In our opinion, that answer should be in favor of permitting resort to Ohio courts for relief and that the trial court properly exercised its jurisdiction.

It should be emphasized that not only was the picketing here "stranger picketing" in the sense that none of the

pickets were employees of Richman Brothers and never had been, but that they were not even picketing at a place where they desired some resultant action on the part of Richman. They were picketing the retail stores in 46 cities, not the factories in two.

The attempt here was to require the union label to be put into Richman suits at the factory. This result could be accomplished, according to the record of this case, irrespective of any contract provision for union security. We do not find in this record any support for the finding that the action of the union constituted an unfair labor practice which would place the jurisdiction of this matter exclusively in the National Labor Relations Board.

Interference with the use of the public streets in Ohio and with ingress to and egress from adjoining premises is, and should be, strictly a matter of Ohio concern and control. Although we recognize, as required by an ordered society, the doctrine of judicial subordination, we are not required by such recognition to refrain from decrying generally what we consider an unwarranted usurpation by federal agencies of that which we deem a matter of local concern. Nor are we required specifically in a situation such as this, where there is no evidence of an unfair labor dispute and it is clear that the National Labor Relations Board has no jurisdiction, to concede that the appropriate Ohio court must abdicate its responsibility to secure to each citizen his constitutionally guaranteed privilege to seek redress in that court for an alleged wrong.

In our opinion, the Court of Appeals properly enjoined mass picketing. But we believe it should have gone further, as did the trial court, and enjoined all picketing in this situation.

WEYGANDT, C. J., and HERBERT, J., concur in the foregoing dissenting opinion.

Opinion of the Court of Appeals.

KOVACHY, J.:

Plaintiff is The Richman Brothers Company, a corporation, manufacturing men's clothing at factories in Cleveland, Ohio, and Sturgis, Kentucky, and selling it at 68 retail stores—31 in 16 cities of Ohio and one each in 37 cities of 16 other states. It employs approximately 1500 manufacturing employees. Its annual purchases from outside of Ohio exceed $2,000,000 and it ships goods in excess of $2,000,000 annually to its stores in states outside of Ohio. The total annual sales of all stores are in excess of $10,000,000. It is conceded that Richman is engaged in interstate commerce.

Defendants are Amalgamated Clothing Workers of America, AFL-CIO; The Cleveland Joint Board, an affiliate of the Amalgamated Clothing Workers of America; various other local union affiliates with the American Clothing Workers of America; and various individual employees and members of said unions.

The cause before us is an appeal; on questions of law and fact, from a judgment entered in favor of the plaintiff and against the defendants in the Common Pleas Court of Cuyahoga County, whereby the defendants were permanently enjoined from picketing the retail stores of the plaintiff. The case is submitted on stipulation of facts, a transcript of the proceedings in Common Pleas Court and on oral arguments and briefs of counsel.

The record discloses that Amalgamated had tried for ten years to organize the manufacturing employees of Richman without success. They, thereupon, decided to change their tactics by pursuing a campaign of economic pressure against the retail stores of Richman. Their plan consisted of a wide spread effort to inform the consuming public of the fact that Richman's clothes are not union

made and do not have a union label, and to urge them to buy clothes that are union made and bear union labels. They carried out this plan by utilizing the media of press, radio, meetings, sound tracks, and leaflets, and in March, 1951, commenced picketing Richman's retail stores with large signs and banners with these inscriptions:

"Richman's clothes are not union made; buy union made clothing."

"Richman's clothes do not have a union label; buy clothes which have union labels."

Their method consisted of patrolling one or two, and in some instances several persons, none of whom were employees of Richman, in front of the main entrances of plaintiff's retail stores with banners and signs above described.

The picketing on the whole was peaceful and orderly. However, the record discloses some 20 occasions in a period of 2 years, where "special sporadic picketing demonstrations" took place before 10 of the retail stores, which were departures from the usual pattern of picketing.

On these occasions 15 to 20 pickets, and sometimes more, would circle single file, 3 to 4 feet apart, in front of the entranceways to the stores, carrying banners and balloons filled with helium gas. The banners were attached to long poles and the balloons to strings 8 to 15 feet long and both banners and balloons carrying inscriptions upon them. They milled about, singing and shouting for hours, creating much confusion and disturbance to all persons passing into or past the stores. By their actions, they blocked the entranceways to the stores and diverted much of the pedestrian traffic outward and away from the entrances.

These demonstrations were patently deviations from peaceful picketing because they constituted conduct which

intruded upon the rights of the public in the use of streets and sidewalks and effectually prevented ingress and egress from and to the entranceways of Richman's stores, thus transgressing Richman's right to free and uninterrupted access to its places of business.

In an opinion reversing the dismissal of the petition in this case by the Common Pleas Court, this court said (Hurd, J.) with respect to the allegation in the petition bearing on this matter that "the special sporadic demonstrations * * * cannot be equated with peaceful picketing but must be construed as mass picketing." 101 O. App. 459; 131 N. E. (2d) 662.

Since the evidence in the record amply supports this allegation, we logically must and do hold that Amalgamated, as far as such demonstrations were concerned, engaged in mass picketing and in a course of conduct that was contrary to law and order and the peace and dignity of the state.

Defendants claim that their activities were in the furtherance of a "union label campaign" and should be interpreted as an aspect of the organization of Richman's manufacturing employees. They say further that they hoped by these means to educate the general public to the fact that Richman does not employ union labor and its clothes do not have union labels, and to "remove the hostility of the employer which * * * was the chief stumbling block to the employees joining the union * * *." Plaintiff in its petition alleges that defendants are engaged in a conspiracy to bring economic pressure to bear against the plaintiff for the purpose of coercing it into forcing unionization of its eligible employees to enable Amalgamated to become the representative of its such employees.

The record is devoid of evidence that Richman ever objected to its employees joining the union. To us, it seems, that the union, despairing of organizing Richman's

manufacturing employees by direct methods, decided to attain this objective through their employer Richman. With this inview, they inaugurated a multi-phased program, in which they utilized all known media of information to familiarize the public with the fact that Richman employees were non-union, and sought to climax the campaign with a type of picketing calculated to bring Richman into line with their purpose of organizing its employees. The picketing, in addition to informing the public of Richman's employees' non-union status, made manifest to Richman their determination to have union labels on its clothes and, at the same time, brought economic pressure to bear on Richman at its most vulnerable spot, its retail stores, since these stores are the only outlet for its manufactured goods. Amalgamated well knew the reluctance of the public generally to cross a picket line. Their unmistakable purpose by these activities, therefore, was to so injure the business of Richman as to force it to enter into a contract with them for the right to use the union label on its clothes. This, however, they well knew, could not be done without the manufacturing employees becoming unionized. Consequently, it necessarily follows that the very essence of Amalgamated's compaign was to intimidate and coerce Richman into compelling its manufacturing employees to join Amalgamated. Such activities are proscribed by the National Labor Relations Act (29 U. S. C. Section 151) as unfair labor practices. Section 8 (a)(1) and (3); and Section 8(b)(2).

The sole question in this case thus becomes:

Where no labor dispute exists between an employer and the non-union employees of a manufacturing plant engaged in interstate commerce, does a State court have the jurisdiction to enjoin a labor union from picketing and bannering the retail stores of said employer for the pur-

pose of coercing and intimidating him through economic pressure into compelling his manufacturing employees to join their union when the picketing and bannering, in the main, is conducted in an orderly and peaceful manner with the exception of certain sporadic demonstrations that amount to mass picketing?

The juridical answers to this question are found in the recent pronouncements of the Ohio State and United States Supreme Courts and may be summarized as follows:

(1) A State court is without jurisdiction to enjoin the picketing by a labor union, in a dispute with an employer, engaging in interstate commerce, over the unionization of the employer's non-union employees, where the union pickets the business locations of such employer in an orderly and peaceful manner and the controversy is related to an unfair labor practice that comes within the purview of the Labor-Management Relation Act for the reason that the employer must initially, at least, pursue its remedy before the National Labor Relations Board.

Grimes & Hauer, Inc. vs. Pollock, 163 O. S. 372; 127 N. E. (2d) 203;

Garner vs. Teamsters, 346 U. S. 485;

Weber, et al. vs. Anheuser-Busch, Inc., 348 U. S. 468;

Retail Clerks International Assn. vs. Newberry, 352 U. S. 987;

Farnsworth & Chambers Co. vs. Local 429, International Workers, — U. S. —, 1 L. Ed. 2d; No. 14, p. 1133;

San Diego Building Trades Council, et al. vs. Garmon, et al., 353 U. S. 26.

(2) A State court has the jurisdiction to enjoin picketing by a labor union, in a dispute with an employer,

engaging in interstate commerce, over the unionization of the employer's non-union employees, where the union pickets the business location of such employer in a disorderly manner that amounts to mass picketing for the reason that a state's interest in law and order is paramount and the National Labor Relation Act does not preempt the State's power to prevent mass picketing, violence and a breach of the peace, even though the controversy is related to an unfair labor practice and comes within the purview of the National Labor Relations Board.

In *Auto Workers vs. Wisconsin Board*, 351 U. S. 266, the Supreme Court of the United States said at page 274:

> "As a general matter we have held that a State may not, in the furtherance of its public policy, enjoin conduct 'which has been made an "unfair labor practice" under the federal statutes.' * * * But our post-Taft-Hartley opinions have made it clear that this general rule does not take from the States power to prevent mass picketing, violence, and overt threats of violence."

See *Allen-Bradley Local vs. Wisconsin Board*, 315 U. S. 740.

It follows from the above that this Court has the jurisdiction, under the facts and circumstances presented in the record, to enjoin the defendants from engaging in mass picketing and any course of conduct which (1) interferes with the means of ingress and egress to and from plaintiff's retail stores; (2) interferes with pedestrian or vehicular traffic in and about said stores, and (3) is contrary to law and order and the peace and dignity of a state. In all other respects, this Court is without jurisdiction.

Decree, accordingly, for plaintiff. Exceptions. Order see journal.

SKEEL, *P. J.* and HURD, *J.*, concur.

APPENDIX C.

Decrees of the Lower Courts.

Decree of the Supreme Court of Ohio.

January Term, A. D. 1959 To-wit: Wednesday, March 4, 1959.

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Cuyahoga County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and it appearing to the Court that there were reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

It is further ordered that the appellees recover from the appellant their costs herein expended taxed at $ .....

ORDERED, That a special mandate be sent to the Court of Appeals of Cuyahoga County, to carry this Judgment into Execution.

Decree of the Court of Appeals.

September 12, 1957.

This cause came on for trial de novo on appeal on questions of law and fact and was heard on the pleadings, the evidence, the arguments of counsel and briefs of counsel and on consideration thereof, the court finds on the evidence for the plaintiff that the statements and allegations in the petition are true; that the defendants, acting at the instruction and under the direction and control of defendant, Amalgamated Clothing Workers of America, have entered into and carried out a plan against plaintiff

as alleged in the petition herein, and that the picketing complained of in the petition is in furtherance of such plan; that the picketing on the whole was peaceful and orderly with the exception of some twenty occasions in a period of two years when "special sporadic picketing demonstrations" occurred as alleged in paragraph 15 of the petition; that such picketing was a departure from the usual pattern and constitutes mass picketing in that it interferes with the rights of the public to the use of streets and sidewalks and to ingress and egress from and to the entranceways of plaintiff's stores, transgresses plaintiff's right to free and uninterrupted access to its place of business and is contrary to law and order and against the peace and dignity of the state of Ohio; that plaintiff has been irreparably damaged by said mass picketing and will continue to be so damaged unless an injunction preventing same is granted; that the plaintiff is without adequate remedy at law; that the court has jurisdiction of the parties; that the court has jurisdiction of the subject matter to the extent that it involves special sporadic picketing demonstrations; that the court does not have jurisdiction of the subject matter herein to the extent that it involves peaceful picketing; that the purpose of the picketing was to bring economic pressure to bear upon the business of plaintiff in order to force it to enter into a contract with defendant, Amalgamated Clothing Workers of America, for the right to use its union label on clothes manufactured by it; that the defendant knew that such contract could not be consummated without the manufacturing employees of plaintiff becoming unionized; that the essential purpose of the picketing was to intimidate and coerce plaintiff into compelling its manufacturing employees to join defendant, Amalgamated Clothing Workers of America; that these activities on the part of defendants constitute unfair labor

practice as defined in Section 8(a)(1) and (3) and 8(b)(2) of the National Labor Relations Act Title 29, United States Code, Section 151; that the National Labor Relations Board has exclusive jurisdiction with respect to such unfair labor practice; and that the plaintiff is entitled to relief against mass picketing, including picketing alleged in paragraph 15 of the petition herein.

WHEREFORE, it is ordered, adjudged and decreed that the defendants, and each of them named in the petition, the respective branches, locals, officers, members, agents and employees of the defendant unincorporated associations or any of them, all persons associated with or acting in concert with the defendants, or any of them, with respect to the act herein enjoined, and all others to whom knowledge of this order shall come, be, and they and each of them are hereby, enjoined and restrained as follows:

(1) From interfering in any manner whatsoever with plaintiff's officers, agents, employees, representatives and others having business with plaintiff; from interfering with ingress to or egress from plaintiff's stores and premises, and with pedestrian or vehicular traffic in or about said stores, including the delivery, unloading and dispatch of equipment, supplies, merchandise, materials and products to and from plaintiff's said stores;

(2) From engaging in mass picketing and demonstrations in front of plaintiff's stores, including particularly demonstrations in which pickets march in circular, quadrangular, or other, formations in front of the entrances to plaintiff's stores;

(3) From in any way interfering with the access to the plaintiff's stores and premises, and from accosting persons seeking to enter or leave plaintiff's stores;

(4) From causing, encouraging or assisting anyone in the commission of said acts.

It is further ordered that plaintiff recover from defendants its costs herein expended, judgment for which is hereby rendered in favor of plaintiff against said defendants.

Plaintiff excepts. Defendants except.

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Office Supreme Court, U.S.
FILED
JUN 27 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted] 85

THE RICHMAN BROTHERS COMPANY,
Petitioner,

v.

AMALGAMATED CLOTHING WORKERS OF AMERICA, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 965

THE RICHMAN BROTHERS COMPANY,
Petitioner,

v.

AMALGAMATED CLOTHING WORKERS OF AMERICA, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents, the Amalgamated Clothing Workers of America, the Amalgamated's Cleveland Joint Board, a regional grouping of constituent locals of the parent group, and individual members and employees of said unions, hereinafter collectively referred to as "Amalgamated" oppose the petition of The Richman Brothers Company, hereinafter referred to as "Richman", for a writ of certiorari to review the judgment of the Supreme Court of Ohio entered in the above entitled case on March 4th, 1959 (168 O. S. 560).

Although Richman's petition for certiorari purports to set forth the question presented (Pet., pp. 6-7), it does not accurately do so. The question presented, properly restated, is as hereinafter set forth.

Opinions Below

The opinion of the Eighth District Court of Appeals of Ohio, reported in *Richman Bros. Co.* v. *Union*, 104 Ohio App. 112, 144 N. E. 2d 573 (1957) is printed in Appendix B of the Petition for Certiorari. The opinion of the Supreme Court of Ohio, reported in *Richman* v. *Amalgamated Clothing Workers*, 168 O. S. 560 (1959), is also printed in Appendix B of the Petition for Certiorari.

Jurisdiction

To the extent that the facts set forth in the petition for certiorari in support of jurisdiction do not adequately summarize or reflect the proceedings below, supplementation is hereinafter made in the Statement.

Question Presented

Whether peaceful picketing by a union for the purpose, as alleged by petitioner herein and found by each of the courts below, of causing the employer to force its employees to become members of the union so that the union, irrespective of the majority's desires, may become the collective bargaining representative, is arguably an unfair labor practice under Section 8 or a protected activity under Section 7 of the National Labor Relations Act and therefore outside the authority of a state court to regulate or enjoin.

Statute Involved

The statutory provisions involved are certain provisions of the National Labor Relations Act, as amended, 29 U. S. C. Sec. 141, *et seq.*, more particularly Sections 157 and 158, portions of which sections are printed in the petition for certiorari as Appendix A.

Statement

The summary of the proceedings and opinions below at pages 2-6 of Richman's petition and the statement contained at pages 7-10 thereof fail to set forth in sufficient detail either the holdings of the courts below or the facts giving rise to the litigation. Accordingly, in order that this Court may have an adequate statement as well as an adequate summary of the proceedings and opinions below, the following supplementary statement is submitted.

The instant case arose out of Amalgamated's attempt to organize Richman's manufacturing employees employed at its factories in Cleveland, Ohio and Sturgis, Kentucky. As part of this campaign, Amalgamated, beginning in 1951, sought to inform the consuming public of the fact that Richman's products were non-union. For this purpose, Amalgamated utilized the media of press, radio, meetings, sound trucks and leaflets and also peacefully picketed Richman's retail outlets with signs bearing the legend that "Richman Bros. Clothes are not union made" (R. 8).[1]

[1] Record references are to the record certified by the Supreme Court of Ohio.

In October 1952, Richman instituted its action in the Ohio Court of Common Pleas for Cuyahoga County seeking an injunction restraining Amalgamated from picketing Richman's retail outlets in Ohio and in all of the other states in which its retail stores were located (R. 3-12). The gist of Richman's petition was that Amalgamated was "engaged, in carrying forward a conspiracy to cause economic pressure to be directed against plaintiff with the intention and for the purpose and objective of thereby causing plaintiff to force sufficient of its eligible employees to become members of defendant Amalgamated, so that defendant Amalgamated may become the representative of its such employees for the purpose of collective bargaining with plaintiff, regardless of the desires of a majority thereof" (R. 7). In addition, Richman complained that from "time to time" Amalgamated engaged in "special sporadic picketing demonstrations" in front of the retail outlets (R. 9). The petition was limited solely to a request for injunctive relief (R. 11-12).

Amalgamated removed Richman's suit to the District Court for the Northern District of Ohio on the ground that Richman's state court action was in reality a controversy arising under the National Labor Relations Act as amended. The case was remanded on the ground that, even were it assumed that Richman's petition alleged an unfair labor practice within the meaning of the National Labor Relations Act, such a charge was outside the original jurisdiction of the District Court. *Richman Bros. Co. v. Amalgamated Clothing Wkrs.*, 114 F. Supp. 185, rehearing denied, 116 F. Supp. 800. Amalgamated's subsequent motion in the state court to dismiss Rich-

man's action on the ground that it was within the exclusive purview of the National Labor Relations Board was denied. Thereupon, Amalgamated initiated proceedings in the Federal District Court seeking to enjoin further prosecution of the state court action on the ground that Richman's petition complained of matters wholly within the exclusive jurisdiction of the National Labor Relations Board. This Court, before whom the matter was ultimately presented, concluded that a federal district court was prohibited from granting the requested injunctive relief by virtue of the provisions of Section 2283 of the Judicial Code (28 U. S. C. 2283). *Amalgamated Clothing Workers of America* v. *Richman Bros. Co.*, 348 U. S. 511. Three of the Justices concluded that Section 2283 did not impose such a restraint. Although the members of this Court differed concerning the extent of the statutory restraint upon federal district courts, both the majority opinion (348 U. S. at 512 and 514) and the dissenting opinions (348 U. S. at 524 and 348 U. S. at 524-525) assumed that the controversy here in issue was within the exclusive purview of the National Labor Relations Board and therefore the state court was without authority.

Concurrently with the commencement of Amalgamated's aforesaid suit in the Federal District Court, the Ohio Court of Common Pleas proceeded to hear and grant Richman's motion for a temporary restraining order on the ground that Amalgamated was picketing for "the unlawful purpose of forcing an employer to force that unionization of its help which for years that same help has refused at the behest of the Amalgamated" *Richman Bros. Co.* v. *Clothing Workers*, 51 Ohio Opinions 145 (1954).

In June, 1955, after issuance of this Court's decision in the aforesaid *Richman* case, the temporary injunction was dissolved and Richman's petition dismissed in the Court of Common Pleas (57 Ohio Opinions 487), on the authority of *Garner* v. *Teamsters Union*, 346 U. S. 485 (1953). Thereafter, however, the intermediate appellate court, the Eighth District Court of Appeals, holding that the "special sporadic picketing demonstrations" referred to in Richman's petition "can not be equated with peaceful picketing but must be construed as mass picketing" and, as such, "suggest[ed] an area for the exercise of state authority under Ohio law" (101 Ohio App. 459, 462-464, 131 N. E. (2d) 662). The Court of Appeals concluded that since the state court had authority over a phase of the controversy, the previous dismissal was improper and the injunction, as it originally issued, should be reinstated (101 Ohio App. 465).

On the trial for a permanent injunction the trial court found "that the [peaceful] picketing complained of represented an unlawful plan or conspiracy against Richman contrary to the picketing policy of Ohio and issued an injunction prohibiting *all (sic)* picketing of the Richman stores". (Pet., Appendix "B", p. 23). It therefore barred the peaceful picketing as well as the "special sporadic picketing demonstrations".

Upon review, the Court of Appeals, again construing the "special sporadic picketing demonstrations" as "mass picketing" concluded that it had authority to issue an injunction limited to that phase of the ac-

tivity (R. 32, 34-35). As to the phases of the picketing concluded to be peaceful, however, it held (R. 34):

> "(1) A State court is without jurisdiction to enjoin the picketing by a labor union, in a dispute with an employer, engaging in interstate commerce, over the unionization of the employer's non-union employees, where the union pickets the business locations of such employer in an orderly and peaceful manner and the controversy is related to an unfair labor practice that comes within the purview of the Labor-Management Relations Act for the reason that the employer must initially, at least, pursue its remedy before the National Labor Relations Board. [Citing decisions of this Court and the Supreme Court of Ohio]"

Accordingly, the court issued an injunction limited to the "special sporadic picketing demonstrations".

On review by the Supreme Court of Ohio, the judgment of the Court of Appeals was affirmed.[2] The Supreme Court of Ohio, setting forth at length this Court's opinion in *Hotel Employees Union, Local No. 255* v. *Sax Enterprises*, 3 L. Ed. 2d 289, 79 S. Ct. 273, concluded (R. 25; 168 O. S. 560, 563):

> "In many conflicts between labor and management where interstate commerce is involved, as is the case here, the National Labor Relations Act asserts itself and is applied to the exclusion of interference by the State courts. This is so with respect to the peaceful picketing of an em-

[2] Amalgamated did not appeal from the holding of the Court of Appeals regarding the "picketing demonstrations".

ployer's premises by labor unions and their members to force the employer to accede to the union's demands and to bring about the unionization of those who work for the employer."

In sum, the Supreme Court of Ohio, as had the Court of Appeals previously, concluded, as Richman had alleged, that the Amalgamated's peaceful picketing was engaged in for the purpose of causing Richman to force its employees to become members of Amalgamated, but that such activity was exclusively within the purview of the National Labor Relations Board and therefore beyond state court regulation or restraint.

Argument

Respondents submit that the court below properly delineated state court jurisdiction in accordance with the preemption postulates uniformly enunciated by this Court. *Garner* v. *Teamsters, etc. Union*, 346 U. S. 485; *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468; *Hotel Employees Union, Local No. 255* v. *Sax Enterprises*, 79 S. Ct. 273; *San Diego Building Trades Council, etc.* v. *Garmon*, 79 S. Ct. 773.

As first stated in *Garner*, Richman "could have presented this grievance to the National Labor Relations Board", and therefore, "the grievance was not subject to litigation in the tribunals of the state" (346 U. S. at 501). This Court there found that the Congressional scheme provided in the National Labor Relations Act envisaged disposition of such matters, at least in the first instance, by the National Labor Relations Board and by no other tribunal. It laid down

the rule that whether the picketing complained of was unlawful, or whether it was of a character which Congress sought to leave free of restraint was a matter beyond court surmise and respecting which the "power and duty of primary decision lies with the Board. . . ." (346 U. S. at 489).[3] See also *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, 478. There has been no deviation from this rule.

As most recently stated in *San Diego Building Trades Council, etc.* v. *Garmon*, 79 S. Ct. 773, 779-780:

> "It is not for [the Supreme Court] to decide [how] the National Labor Relations Board would have, or should have, decided these questions. . . . When an activity is arguably subject to Section 7 or Section 8 of the Act the states as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.
>
> * * * *
>
> . . . and since such activity is arguably within the compass of Section 7 or Section 8 of the Act, the States' jurisdiction is displaced."

On the applicable facts herein presented, it can no longer be properly questioned but that the activity complained of here is arguably an unfair labor practice or a protracted activity.

[3] In *Garner*, this Court was considering the validity of a state court injunction against organizational picketing of the premises of an employer engaged in interstate commerce where the purpose of the picketing—indistinguishable from the purpose alleged by Richman in the instant case and so found by each of the state courts—was to "coerce the petitioners into compelling or influencing their employees to join the union" (346 U. S. at 487).

The activity here involved, however it may be characterized—organizational picketing, recognition picketing, etc.—is conduct closely related to the conduct denominated by the National Labor Relations Board in the line cases beginning with *Curtis Bros., Inc.* as an unfair labor practice.[4] Whether the activity complained of here is a violation 8(b)(1), as held by the Board in *Curtis*, or 8(b)(2), as suggested in *Garner*, or 8(b)(4), as suggested in *Hotel Employees*, is a matter for the National Labor Relations Board to consider and to pass upon in the first instance.

If it is not an unfair labor practice, it may well be, as Amalgamated urged throughout the state court proceedings, that the picketing in the instant case is concerted activity affirmatively protected by the National Labor Relations Act. See 93 Cong. Rec. A3370 (1947); see also *San Diego Building Trades Council, Etc.* v. *Garmon, supra*, at p. 782 (concurring opinion); *Drivers Local Union No. 276* and *Capital Service, Inc.*, 100 N. L. R. B. 1092 (1952).

But whether the activity here is an unfair labor practice or protected activity is first a matter for adjudication or other disposition by the National Labor Relations Board. Only then may there possibly be an area for state court regulation.

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[4] *Curtis Bros., Inc.*, 119 N. L. R. B. 232, set aside — F. 2d — (C. A. D. C. 1958) [43 L. R. R. M. 2156], cert. granted, *sub nom. National Labor Relations Board* v. *Drivers, Chauffers, Helpers Local Union No. 639, etc.*, 79 S. Ct. 876. In that case the Board concluded that picketing actively by a minority union for the purpose of compelling recognition constituted a violation of Sections 8(b)(1)(A) of the National Labor Relations Act.

The very complexity of the arguments advanced in Richman's petition in support of its request for certiorari points up that the activity complained of is arguably an unfair labor practice or protected activity. Richman's arguments reveal that what it essentially seeks of the courts, state and federal, is that they place themselves in the position of the National Labor Relations Board and pass upon involved questions of law requiring the most sophisticated analysis of the National Labor Relations Act and the decisions thereunder. On facts such as are here involved this Court has repeatedly stated that the courts, federal and state, must "defer to the exclusive competence of the National Labor Relations Board" (*Garmon, supra,* at p. 730).

As the foregoing discussion makes plain, this is not a case, as Richman urges in which the union activity is "governable by the State or it is entirely ungoverned". As *Garmon* plainly states, to reach this conclusion the activity must first be presented to the Board and only then, if the Board decides that the activity is neither protected nor prohibited, is there a question raised as to whether state regulation is foreclosed (*Garner,* at p. 780). Since Richman failed to avail itself of the opportunity to present this matter to the Labor Board, "it is not appropriate to surmise how the National Labor Relations Board might have decided this controversy had [petitioner] presented it to that body" (*Garner, supra,* at p. 489).

The decision of the court below is in full accord with the preemption principles heretofore enunciated by this Court. The State Court's lack of authority is plain. Petitioner has failed to submit any valid reason for the grant of a writ of certiorari.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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